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IN THE

Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

-vs-

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

No. 316

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

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IN THE

Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

-vs-

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

(On Appeal from the Supreme Court of Florida)

MOTION TO DISMISS OR AFFIRM ON BEHALF OF APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

Appellee, Orkin Exterminating Company of Florida, Inc., respectfully moves, pursuant to Rule 16 of this Court, to dismiss the appeal herein on the following grounds:

(1) The appeal is from a state court and does not present a substantial federal question.

(2) The judgment of the state court appealed from rests on an adequate non-federal basis.

In the alternative appellee moves the Court, pursuant to said Rule 16, to affirm the judgment of the state court on the following ground:

(1) It is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion and decision below are set forth in the Appendix to appellant's Jurisdictional Statement.

STATUTE INVOLVED

The statute involved is Section 542.12 (2), Florida Statutes, 1963, and is set forth in appellant's Jurisdictional Statement at pages 4-5.

PRELIMINARY STATEMENT

This appeal is from a decision of the Supreme Court of Florida holding valid Section 542.12 (2), Florida Statutes, 1963.

Section 542.12 (2) aforesaid specifically authorizes and declares valid contracts made by an agent or employee with

his employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of the employer within a reasonably limited time and area so long as the employer continues to carry on a like business therein.

Appellant, Reuben Capelouto, hereinafter referred to as Capelouto, was employed by appellee, Orkin Exterminating Company of Florida, Inc., hereinafter referred to as Orkin, as a branch manager and prior to and during Capelouto's employment he entered into certain contracts with Orkin not to compete with Orkin for a period of two years immediately following termination of his employment in the area managed by Capelouto in the course of his employment. (Appellant's Jurisdictional Statement 1-2)

The Supreme Court of Florida held the statute to be valid and the contract to be reasonable and enforceable. Appellant, Capelouto, urges that a federal question is involved and contends that the statute offends the Fourteenth Amendment to the Federal Constitution.

Appellee contends that the statute is merely declaratory of the public policy of the State of Florida and that reasonable contracts contemplated by the statute have been upheld and sustained in numerous decisions of state and federal courts.

The Supreme Court of Florida has upheld the statute and contracts entered into pursuant thereto in several decisions.

QUESTIONS PRESENTED

For the purpose of argument only we adopt the questions presented appellant, Capelouto, as follows:

(1) DOES SECTION 542.12(2), FLORIDA STATUTES, IN ITS APPLICATION TO APPELLANT, DEPRIVE HIM OF RIGHTS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(2) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING THE EMPLOYEE FROM COMPETING WITH HIS EMPLOYER FOR A TIME BEYOND THE TWO-YEAR PERIOD DEPRIVE THE EMPLOYEE OF RIGHTS GUARANTEED HIM UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

(3) WHEN AN EMPLOYEE AGREES, DURING THE TERM OF HIS EMPLOYMENT, WITH HIS EMPLOYER NOT TO COMPETE FOR TWO YEARS AFTER THE TERMINATION OF SUCH EMPLOYMENT, DOES THE ACTION OF A STATE COURT IN ENJOINING EMPLOYEE FROM COMPETING WITH HIS EMPLOYER

FOR A TIME BEYOND THE TWO-YEAR PERIOD IMPAIR THE OBLIGATION OF A CONTRACT, CONTRARY TO ARTICLE III, SECTION 10, OF THE UNITED STATES CONSTITUTION?

ARGUMENT

1. Contracts in restraint of trade are permissible under state and federal law if the contract is reasonable both with respect to the public and to the parties.

Undoubtedly, the earlier doctrine of the law was that all contracts in restraint of trade were contrary to public policy, void and unenforceable, but this doctrine has been modified by the necessities of modern conditions and the present doctrine is that such contracts are valid and enforceable if reasonable in respect to the public and the parties. As early as the year 1911, this Court recognized this modification of the earlier doctrine in the case of *Dr. Miles Medicine Company v. John D. Park & Sons Co.*, 220 U. S. 373, 55 L. ed. 502, wherein this Court said:

> "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties, and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are

void as against public policy. As was said by this court in Gibbs v. Consolidated Gas Co. 130 U. S. 409, 32 L. ed. 984, 9 Sup. Ct. Rep. 553: 'The decision in Mitchel v. Reynolds, 1 P. Wms. 181, s. c. 1 Smith, Lead. Cas. 7th Eng. ed. 407; 8th Am. ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things and a state of society different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable. Rousillon v. Rousillon, L.R. 14 Ch. Div. 351; Leather Cloth Co. v. Lorsont, L.R. 9 Eq. 345.'

"'The true view at the present time,' said Lord Macnaghten in Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. (1894) A.C. p. 565, 6 Eng. Rul. Cas. 413, 'I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification and indeed it is the only justification, if the restriction is reasonable,—reasonable, that is, in reference to the interests of the

parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public.'"

Literally hundreds of state and federal decisions are in accord with the doctrine of reasonableness set forth in Miles, supra.

Annotations in 41 ALR 2d 15-222, and 43 ALR 2d 94-321, cite cases from the federal courts and practically all state courts upholding contracts similar to the contract involved herein.

These cases upholding contracts similar to the one here involved are relevant because the basic fallacy of appellant's position, argument and complaint is that he has been deprived of his rights under the Fourteenth Amendment by the statute—but the fact is that appellant freely, voluntarily and as part of the consideration for his employment, contracted not to do certain things for a limited time in a limited area which otherwise he would have a perfect right to do.

The statute did not and does not deprive appellant of a single right guaranteed by the Fourteenth Amendment. The statute simply permitted him to do that which he did, to-wit: to enter into a reasonble contract to refrain from exercising certain rights that were his to exercise, or to contract not to exercise—and he elected to avail himself of the benefit of the very statute he now condemns as in-

valid and enter into a reasonable contract which he now repudiates and seeks the aid of the courts in justifying his repudiation.

The second question presented by appellant actually presents no federal question.

The appellant, Capelouto, appealed to a Florida court of equity for relief from his contract and after holding Section 542.12(2) constitutional and the contract entered into pursuant thereto reasonable and enforceable, the Chancellor took into consideration that immediately upon termination of his employment the appellant, in direct violation of his contract, commenced a competitive business of his own, advertised his service and over a period of months began servicing customers of appellee, Orkin, and upon consideration of these facts gave appellant approximately one month to arrange his affairs before the effective date of the injunction, and then by said injunction enjoined appellant, Capelouto, from further breach of the contract for a period of two years from the effective date of the injunction.

The Chancellor merely gave effect to the intent of the parties and required Capelouto to abide by the two years of non-competion which he had agreed to.

The Supreme Court of Florida recognized the equity inherent in the Chancellor's decree and affirmed it.

The appellant suffered no loss of rights under this provision of the decree except the rights he had lawfully contracted away.

In selecting decisions in support of appellee's position we are overwhelmed by available authorities.

The Supreme Court of Florida adheres to the rule announced by this Court in Miles, supra, and has pronounced the law of Florida in several cases to be that reasonable contracts in restraint of trade are not unlawful and that the statute authorizing such contracts is a valid enactment of the Florida Legislature.

In *Standard Newspapers v. Woods* (Fla. 1959), 110 So. 2d 397, the Court said:

> "We come, then, to the conclusion that the chancellor ruled correctly when he held the act constitutional."

Florida District Courts of Appeal have followed the decisions of the Supreme Court of Florida and in several cases have held contracts similar to the one here involved to be valid and enforceable.

In *Atlas Travel Service, Inc. v. Morelly* (DCA - 1, 1957) 98 So. 2d 816, a period of two years was found to be a reasonable time in a non-competing contract, and in the same case the Court found that the area specified in the contract coincided with the area of the employee's activity in behalf of the employer and held such area to be reasonable limitation for non-competition.

In the case of *The American Building Maintenance Co., of Oakland v. Fogelman* (DCA-3, 1964) 167 So. 2d 791, the Court held a three year period in a non-competing agreement to be reasonable and valid between employer and employee.

In the case of *Fogle, et al. v. Orkin Exterminating Company of South Florida, Inc.* (DCA-2, 1964) 168 So. 2d 153, the Court held the statute to be valid and upheld the reasonableness of a two year period and an area coinciding with the area of the employee's activity for the employer to be reasonable.

In the case of *Orkin Exterminating Company of South Florida, Inc., v. Lefkowitz* (DCA-3, 1964) 169 So. 2d 336, the Court upheld the statute and sustained as reasonable a period of two years after termination of employment and an area coinciding with the employee's activities for the employer as reasonable restrictions in the contract.

In this case we have a contract where the employee agreed not to engage in a competitive activity with the employer for a period of two years after termination of employment in an area coinciding with the area over which the employee had charge as a branch manager of the employer.

In this case two Florida courts, including the Supreme Court of the state, have held the statute to be constitutional and the contract reasonable and enforceable.

Factors considered by the Florida courts and which are relevant in consideration of the reasonableness of the contract, are:

(1) The business of the employer—pest extermination, involved materials, techniques and methods confidential in nature, which of necessity came to the knowledge of the employee.

(2) The territory embraced in the contract coincided generally with the area assigned to the employee as branch manager.

(3) The time agreed to for non-competitive activity, to-wit: two years, was reasonable to protect the employer from unfair competition.

This holding of the Florida courts is in full and strict accord with the rule announced by this Court in Miles, supra.

A search of other state cases shows that the holding of the Florida court was in full accord with the holding of practically all states in hundreds of decisions.

The following cases hold that a period of two years is a reasonable period in a non-competitive contract between employer and employee:

Federal

Masden v. Travelers Ins. Co., (1931, CA 8th, Mo.) 52 F. 2d 75.

Heinz v. National Bank (1916, CA 8th, Mo.) 237 F. 942.

Connecticut

Torrington Creamery v. Davenport (1940) 126 Conn. 515, 12 A 2d 780.

Georgia

Northeast Georgia Artificial Breeders Asso. v. Brown (1953) 209 Ga. 547, 74 SE 2d 660.

Illinois

Hoops Tea Co. v. Dorsey (1901) 99 Ill. App. 181.
Jules Chain Store Corp. v. Stone (1942) 316 Ill. App. 45, 43 NE 2d 849.

Massachusetts

Boston & S. Laundry Co. v. O'Reilly (1925) 253 Mass. 94, 148 NE 373.

Ohio

Harry Livingston, Inc. v. Stern (1941) 69 Ohio App. 105, 43 NE 2d 302.

New Jersey

A. Hollander & Son v. Imperial Fur Blending Corp. (1949) 2 NJ 235, 66 A 2d 319.

The above are but a few of the hundreds of cases cited and discussed in the annotation in 43 ALR 2d 94-321.

The following cases hold that territory limited to territory in which the employee engaged in business for his employer is reasonable:

Federal

Cali v. National Linen Service Corporation (1930, CA 5th, La.) 38 F 2d 35.

Illinois

Smithereen Co., v. Renfroe (1945) 325 Ill. App. 229, 59 NE 2d 545.

Pennsylvania

Crosby v. McGlauflin (1945) 94 Pittsb Leg J 213.

Maryland

Deuerling v. City Baking Co., (1928) 155 Md. 280, 141 A 542.

New Jersey

Pilgrim Coat, Apron & Linen Service, Inc. v. Krzywulak (1948) 141 N.J. Eq. 212, 56 A 2d 584.

The above are but a few cases selected from the hundred of cases sustaining appellee's position in this issue.

The Florida courts took into consideration the fact that the appellant, Capelouto, came into possession of confidential information and that this is a material factor in determining reasonableness of the terms of the contract.

The following cases sustain the Florida courts on this point:

Federal

Knapp v. S. Jarvis Adams Co., (1905, CA 6th, Ohio) 135 F 1008.

Carter v. Alling (1890 CC Ill.) 43 F 208.

Illinois

Cahill v. Madison (1901) 94 Ill. App. 216.

Missouri

Haysler v. Butterfield (1949) 240 Mo App 733, 218 SW 2d 129.

New Jersey

Silbros, Inc. v. Solomon (1947) 139 NJ Eq 528, 52 A 2d 534.

New York

Holland Furnace Co. v. Beers (1941) 177 Misc 29, 29 NYS 2d 876.

Texas

Grace v. Orkin Exterminating Co. (1953, Tex Civ App) 255 SW 2d 279.

CONCLUSIONS

(1) Section 542.12(2), Florida Statutes, 1963, authorizes reasonable contracts between employer and employee in restraint of trade, and it follows that if such reasonable contracts in restraint of trade are not invalid or violative of the Fourteenth Amendment to the Constitution of the United States, then the statute itself is not invalid.

(2) Reasonable contracts in restraint of trade under decisions of this Court, other federal courts, and innumerable state courts have been held valid and in accord with the federal and state constitutions.

(3) The appeal presents no federal question, the decision of the state court is correct, and the appeal should be dismissed or the judgment of the state court affirmed.

Respectfully submitted,

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ATTORNEY FOR APPELLEE, ORKIN EXTERMINATING COMPANY OF FLORIDA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail, to Honorable Wilfred C. Varn of the law firm of Ervin, Pennington, Varn & Jacobs, P. O. Box 1567, Tallahassee, Florida, counsel of record for appellant,

this _____ day of July, 1966.

Attorney for Appellee
and a member of the bar of the
Supreme Court of the United States